



INDIANA ENVIRONMENTAL JUSTICE ADVISORY COMMITTEE

Meeting Minutes from Thursday, 10/9/03

Present at IUPUI /Indianapolis videoconference location: Dana Reed Wise, Michelle Reeves & Karen Terrell (I DEM), Rickie Clark (I DOT), Keith Veal (City of Indianapolis), Pam Fisher (I DOC), Glenn Pratt (Citizen representative), and Ellen Holland (Realtors Association).

Present at I U Northwest/Gary videoconference location: Richard Hug (I UN-SPEA) and Christine Brooks (East Chicago Waterway)

Present at I U/Bloomington videoconference location: Ed Rhodes (I U)

I. Introductions and Welcome

Dana Reed Wise welcomed all those participating in today's meeting

II. Legal Issues – Michelle Reeves, I DEM

Michelle Reeves from I DEM's Office of Legal Counsel attended this meeting to provide some background information regarding environmental justice. Below are notes from that discussion:

- The EPA defines environmental justice as the fair treatment of people of all races, cultures, and incomes with respect to the development, implementation, and enforcement of environmental laws and policies, and their meaningful involvement in the decision making processes of the government.
- Community groups have relied on Title VI of the Civil Rights Act of 1964 to assert challenges to environmental use decisions that contravene the environmental justice policy. Specifically, Section 601 of Title VI provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."
- Private citizens could sue to enforce Section 601 of Title VI of the Civil Rights Act of 1964. The private citizen could obtain both injunctive relief and damages. This section prohibits intentional discrimination. As indicated earlier proving intentional discrimination in the environmental context is extremely difficult. Therefore, Title VI was rarely used to assert environmental justice claims. However, an unintended boon to environmental/civil rights legislation came in the form of an Executive Order.

- In 1994 President Clinton issued Executive Order 12898. It directs federal agencies with an environmental or public health mandate to “make achieving environmental justice part of its mission by identifying and addressing...disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States...” Basically, all programs or activities that affect human health or the environment and receive federal financial assistance must comply with the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964.
- These agencies must collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income.
- Additionally, in 1998 the EPA issued interim guidance for investigating Title VI administrative complaints challenging permitting decisions. The guidance was designed to help agencies measure state and local government compliance with Title VI regulations.
- Section 602 of the Civil Rights Act of 1964 authorizes federal agencies to effectuate the provisions of §601 of Title VI by issuing rules, regulations, or orders of general applicability. According to the EPA, facially neutral policies will violate the Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative. Basically, this section was interpreted as prohibiting disparate impact discrimination. With this interpretation of Title VI and its guidelines a state or local government that failed to comply would risk losing federal funding and could face prosecution by the U.S. Department of Justice.
- Environmental and community groups were encouraged by this interpretation. In the last few years these groups relied on Title VI of the Civil Rights Act of 1964 to challenge state decisions which result in disparate environmental impacts to low-income and minority communities. That is until the Supreme Court’s decision in *Alexander v. Sandoval*, 121 S.Ct. 1511, 1523 (2001) which reversed decades of precedence.
- Prior to *Sandoval*, many federal courts interpreted Title VI and its regulations to imply a private right of action for both intentional (§601) and disparate impact discrimination (§602). These courts noted that the ability to sue for disparate impact was important because plaintiffs did not need to show intentional mistreatment; they only had to show that minorities were disproportionately injured by a policy or practice and that such disparate effects could not be justified. These courts in essence fashioned a remedy to effectuate the congressional purpose expressed by a statute.
- *Sandoval* was a class action lawsuit, which argued that the State of Alabama violated Title VI’s disparate impact regulations by requiring applicants for a drivers’ license to take the written examination in English. The Alabama Department of Public Safety accepted grants of financial assistance from the Department of Justice and the

Department of Transportation and so subjected itself to the restrictions of Title VI. Title VI prohibits discrimination based on race, color, or national origin in covered programs and activities. Section 602 authorizes federal agencies to effectuate Section 601 by issuing regulations, and the Department of Justice in an exercise of this authority promulgated a regulation forbidding funding recipients from utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination based on their race, color or national origin.

- The issue before the Court was whether there was a private cause action to enforce the regulation. The Supreme Court ruled that Title VI does not create a freestanding private right of action to enforce regulations promulgated under §602. The ability of plaintiffs to enforce Title VI and its regulations extends no further than the scope of the statute's prohibitions. Title VI itself has been interpreted to prohibit only intentional discrimination. Because the regulations that prohibit disparate impact discrimination extend beyond the statute's prohibition against intentional discrimination, plaintiffs cannot directly enforce the regulations without a congressional mandate to do so. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. (*Sandoval at 1519*)
- Since the *Sandoval* decision ended the right of private citizens to sue for disparate impact discrimination under Title VI regulations, some petitioners have opted for filing Section 1983 claims.
- Section 1983 provides, in relevant part: Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory...subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.
- Causes of action under section 1983 are not limited to claims based on constitutional or equal rights violations. Certain rights created under federal statutes are enforceable through section 1983. However, this rule is limited by two exceptions: a section 1983 remedy is not available where Congress has foreclosed such enforcement of the statute in the enactment itself, and the remedy is not available whenever the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.
- The efficacy of filing 1983 actions against government actors diminished with *South Camden Citizens in Action v. New Jersey Department of Environmental Protection* 274 F.3d 771 (3 Cir. 2001). In *South Camden*, a citizens group and ten residents of the Waterfront South neighborhood filed suit under §1983 claiming that the New Jersey Department of Environmental Protection had discriminated against them by issuing an air permit to St. Lawrence Cement Co. to operate a facility that would have an adverse disparate racial impact upon them in violation of Title VI of the Civil Rights Act of 1964.

- The 3rd Circuit held that a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute. Similarly, we reject the argument that enforceable rights may be found in any valid administrative implementation of a statute that in itself creates some enforceable right. ...It is clear that, particularly in light of *Sandoval*, Congress did not intend by adoption of Title VI to create a federal right to be free from disparate impact discrimination and that while the EPA's regulations on the point may be valid, they nevertheless do not create rights enforceable under section 1983.
- The Court stated: if there is to be a private enforceable right under Title VI to be free from disparate impact discrimination, Congress, and not an administrative agency or a court, must create this right.
- The U.S. Supreme Court denied writ of certiorari in this matter; thus, the Third Circuit ruling stands. 122 S.Ct. 2621 (2002)

There is nothing that IDEM can do to prevent the issuing of a permit if an applicant meets all requirements for that permit. Local zoning ordinances become very important because cities and towns would need to address zoning issues if they wish to try and prevent an applicant from coming into their community.

In a general discussion of what other states are doing in terms of environmental justice, the group thought it would be beneficial to look at California as well as Florida. IDEM will conduct some research to determine what other information is available from other states. Keith Veal reported that Chicago, Illinois is also doing some interesting things regarding EJ.

III. Next meeting agenda items

The following were topics that members indicated they'd like to discuss at a future meeting:

- Environmental health indications from I SDH
- Establishment of a "cancer database" for Indiana. Does I SDH have a cancer report that we can see? Is there legislation that would require hospitals to report cancer information?
- Share research that is obtained regarding Florida's environmental justice initiatives.
- TOXMAP – a mapping inventory from TRI and HSS – Ed Rhodes

If there are additional agenda items that you would like to include, please email Karen Terrell at kterrell@dem.state.in.us.

